

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-6071

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

PHILIP B. SCHWAB and MARY LOUISE SCHWAB,

Plaintiffs-Appellants

v.

UNITED STATES OF AMERICA,

Defendant-Appellee

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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BRIEF FOR THE APPELLEE

STATEMENT OF THE ISSUES PRESENTED

This case involves a dispute concerning federal taxes. The District Court entered summary judgment in favor of the United States and dismissed the complaint. The issues raised by this appeal are:

1. Whether the District Court had jurisdiction to grant the relief sought by the complaint.
2. Whether the District Court correctly denied plaintiffs leave to amend their complaint by adding a dissolved, closely held corporation as a party plaintiff.

STATEMENT OF THE CASE

This is an appeal by the plaintiffs, Philip B. Schwab and Mary Louise Schwab, from the judgment of the United States District Court for the Western District of New York dismissing their complaint with prejudice and entering summary judgment in favor of the Government. (R. 14.)^{1/} Although the Schwabs' complaint was for the refund of taxes, no specific amount of money is involved in this suit. The judgment of the District Court (Judge Burke), which is not officially reported, was entered on February 24, 1977, and the Schwabs filed a timely notice of appeal on April 18, 1977. (R. i.) Jurisdiction of this Court is based on 28 U.S.C., Section 1291.

The facts underlying this appeal, as reflected in the record, may be summarized as follows:

^{1/} "R." references are to the record appendix contained at the end of the Schwabs' brief.

Appellants' counsel conferred with the Government's trial attorney prior to transmittal of the record on appeal, and the two agreed that the entire record should be sent to this Court. Contrary to Rule 30(b) of the Federal Rules of Appellate Procedure, however, counsel for the Schwabs did not designate the materials he intended to include in their appendix, nor did he give the Government an opportunity to counterdesignate documents which it desired to have included. Accordingly, for the convenience of the Court, the Government has prepared an Appendix B, infra, to its brief, in which it has included additional materials it considers relevant to this appeal. Other references are to the documents contained in the original record on appeal.

In 1964, Philip Schwab was a corporate officer and shareholder in a business commonly known as Schwab Brothers Trucking Company, Inc. (hereinafter referred to as Schwab Brothers or the corporation), which was organized under the laws of the State of New York. (Compl. 1, Appendix B, infra.) According to the Schwabs' complaint (pp. 1, 2), the Internal Revenue Service caused or contributed to the financial failure of Schwab Brothers by the way it went about collecting certain taxes asserted to be due and owing by the corporation. The complaint also alleged (p. 2) that the Internal Revenue Service seized all the assets of the corporation, including accounts receivable, and has held those assets ever since, without ever accounting to plaintiffs with respect to the property. While not part of the record in this case, it appears from other reported decisions that between January 15 and February 16 of 1965 the District Director of the Internal Revenue Service assessed allegedly delinquent taxes due from Schwab Brothers in the amount of \$200,672.65. On February 16, 1965, the Internal Revenue Service filed a notice of lien relating to those assessments with the county clerk, and on March 5, 1965, pursuant to the lien, the Director levied upon and seized numerous pieces of equipment and supplies. Bethlehem Steel Corp. v. Foley, 399 F. 2d 314, 315 (C.A. 2, 1968); L. B. Smith, Inc. v. Foley,

341 F. Supp. 810, 812 (W.D. N.Y., 1972).^{2/} According to plaintiffs, the taxes involved were employee withholding taxes. (Br. 2.)

On June 26, 1972, counsel for the Schwabs sent a letter, denominated a "protest," to the District Director, relating primarily but not exclusively to the Schwabs' liability for the year 1966. (R. 5.) The Director responded in a letter on July 12, 1972, asking counsel again to file a proper protest in accordance with a particular, enclosed Internal Revenue Service publication. (R. 7.) There is no record of any response to this letter, but on February 1, 1973, the Schwabs filed a two-count complaint in the United States District Court for the Western District of New York.^{3/} (R. 15.)

^{2/} In the above-cited cases, the courts held that the Government's tax lien had priority over the liens of the materialman (Bethlehem Steel) and of the conditional vendor (L. B. Smith, Inc.). While Schwab Brothers was not joined in the Bethlehem Steel case, it was a party defendant in L. B. Smith, Inc.

^{3/} Because the first paragraph of the complaint alleged (p. 1) that the Schwabs were residents of Florida, the Government moved to dismiss the case for improper venue (R. 16). Under 28 U.S.C., Section 1402(a)(1), Appendix A, infra, venue for refund suits is the judicial district in which plaintiffs reside. Rather than dismissing the complaint, the District Court transferred it to the Southern District of Florida, the place where the suit might have been brought. (R. 22.) Upon receipt of a later affidavit from Philip Schwab that he and his wife now resided in New York, the Florida District Court granted plaintiffs' motion for change of venue and sent the case back to the Western District of New York. (See Order of January 10, 1975.) The case has since remained in New York; judgment was entered there and the appeal was properly taken to this Circuit.

The second count of the complaint (p. 3) sought damages of \$5,000,000 for the destruction of plaintiff Philip Schwab's business. The District Court granted the Government's motion to dismiss this count for lack of subject matter jurisdiction (R. 21) and plaintiffs do not contend that this was error (Br. 1). In their first count, however, plaintiffs sought (Compl. 1, Appendix B, infra) "a determination pursuant to Title 26 of the United States Code of credits, overpayments and refunds due the plaintiffs * * *, regarding the income tax due and owing upon the plaintiffs' income for the years 1964 through 1972 inclusive." They further alleged that they have filed "tentative" or "not final" income tax returns because they did not know the "exact financial position respecting * * * [Schwab Brothers'] assets as between the parties," and because the Internal Revenue Service had seized corporate books and records as well as assets. (Compl. 2, Appendix B, infra.) The complaint continues that this lack of knowledge has prevented plaintiffs from ascertaining whether any taxes are owed by them or refunds due them, and adds that they will not be in a position to state their claim for credits, adjustments or overpayments until their cause of action is determined. Count One concludes by alleging that the letters of June 26, 1972,

and July 12, 1972, constituted a claim for refund and its disallowance by the Internal Revenue Service, and that this cause of action is based upon that claim for refund or credit. (Compl. 2, Appendix B, infra.)

On May 3, 1973, plaintiffs moved for an order allowing them to amend their complaint by adding Schwab Brothers, the corporation, as a party plaintiff. (R. 16.) In their proposed amended complaint (R. 11-13), they allege (R. 11, par. 2) that Schwab Brothers no longer has a principal place of business, "but that at all times hereinafter material, it filed tax returns in respect of which claim is made" with the Internal Revenue Service office in Buffalo. In support of that motion, counsel for the Schwabs submitted an affidavit, stating that he had come to the conclusion that the issues to be determined in this matter "required that the corporation be added as a party plaintiff primarily because any verdict in favor of the plaintiffs could not be fully effectuated if the corporate plaintiff were not a party to the lawsuit." (R. 9.) The District Court denied this motion (R. 20, 21), an action which plaintiffs argue constituted error (Br. 1).

Although an early memorandum by the Government, filed on June 5, 1973, sought dismissal on the ground that plaintiffs

had not filed a timely claim for refund, the District Court initially refused to pass on this issue, ruling that plaintiffs had properly alleged their jurisdictional requirements in Paragraphs 8 and 9 of the complaint. (R. 18, 19.) On September 13, ^{4/} 1974, however, the Government renewed its motion to dismiss, arguing that plaintiffs had neither paid the taxes due nor filed a claim for refund, and that, therefore, the court lacked subject matter jurisdiction over the suit. The motion was supported by the affidavit of W. Gilbert Hassett, Assistant Chief of the Audit Division of the Internal Revenue Service, stating that (R. 25) after reviewing Audit Division records of the Buffalo District Internal Revenue Service, he had found no record of a claim for refund either by the Schwabs or on behalf of Schwab Brothers, nor was there any record of the Internal Revenue Service's rejection of any such claim of the individuals or the corporation.

^{4/} This motion was made in the Southern District of Florida, where the case had initially been transferred due to improper venue in New York. See fn. 3, p. 4, supra. The docket entries in the revived New York case indicate (R. i) that the papers initially filed in Florida were then filed in v-75-23, the number assigned to this case when it was retransferred to New York from Florida. A good summary of the rather involved proceedings in this case can be found in the June 2, 1975, memorandum of the Government in support of its motion for summary judgment.

On May 12, 1975, Judge Burke heard oral argument on the motion to dismiss. At the outset of the hearing, the court stated that since matters outside the pleadings, such as affidavits, were presented for its consideration, it would treat the motion as a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. (Deft. Memorandum in Support of its Motion for Summary Judgment, p. 3.) In accordance with this statement by the court, the Government on June 2, 1975, filed its motion for summary judgment. (R. i; Motion for Summary Judgment, Appendix B, infra.) Judge Burke granted the motion on February 23, 1977, dismissing the complaint with prejudice. (R. 14.) From this order plaintiffs now appeal.

SUMMARY OF ARGUMENT

Plaintiffs contend that the District Court erred both in its granting of the Government's motion for summary judgment and in its denial of plaintiffs' motion for leave to add their dissolved corporation, Schwab Brothers, as a party plaintiff to this lawsuit. These contentions, however, are without merit. Regardless of the truth of plaintiffs' allegations (a point which we do not concede), there are three reasons why the District Court should have dismissed this case for lack of subject matter jurisdiction.

First, it does not appear that plaintiffs have in fact ever paid the taxes for which they now seek a refund. Under Flora v. United States, 362 U.S. 145 (1960), the payment of taxes is a prerequisite to a refund suit. Here, however, all the indications are that the taxes were paid not by the plaintiffs but by Schwab Brothers, the corporation, which is of course a separate taxable entity. Moreover, even if, as plaintiffs allege, actions by the Internal Revenue Service prevented plaintiffs from ascertaining the correct amount of the corporate liability, it is not clear how such actions prevented them from determining what their individual tax liabilities were. Further, regardless of the difficulty plaintiffs may have had in computing

their tax liability, they should certainly have been able to allege what amounts they have actually paid over. Their failure to do so, in the Government's opinion, amounts to an admission in this case that the basic jurisdictional requirements of Flora have not been met.

Second, even if the Flora obstacle is somehow overcome, it is apparent that plaintiffs have not met the requirements of Section 7422(a) of the Internal Revenue Code of 1954. That section provides that no suit for refund of taxes can be brought unless a claim for refund has first been duly filed with the Internal Revenue Service. Although plaintiffs maintain that their letter of June 26, 1972, constituted a valid informal claim for refund, it is clear that the letter cannot be so read. The fatal flaw in that document is that it does not request, in express, implied, or even provisional terms, a refund. As a consequence, even if the Internal Revenue Service knew of facts which might entitle plaintiffs to a refund, that knowledge is irrelevant, for the availability of information to the Service is not equivalent to notice that a claim is asserted based on that information. Although plaintiffs contend that their lack of knowledge was attributable to the "sloppy procedures" of the Internal Revenue Service, it is surely not too much to expect

them, in a letter which they now characterize to be a refund claim, to make some indication that they would like to receive a refund if in fact they are entitled to one.

Third, it seems apparent that most of the years in issue here are barred by the statute of limitations. Section 6511(a) requires taxpayers to file any claims for refunds within three years of filing of their returns or two years from the payment of the tax, whichever is later. The requirement that a claim be timely in its filing is jurisdictional and cannot be waived. Since plaintiffs have not informed us, in their vague and imprecise pleadings, either whether returns have been filed or taxes have been paid, it is impossible to be definitive on the limitations issue. It seems probable, however, that the years 1964 through 1969 are time barred and that the District Court was therefore without jurisdiction to grant any relief concerning them.

Plaintiffs' second contention, that the District Court erred in denying their motion to amend their complaint by adding Schwab Brothers as a party plaintiff, is also without merit. Initially, of course, it is apparent that since the District Court lacked jurisdiction here, it actually had no power to rule on the motion. But even if there was jurisdiction as to the individual plaintiffs,

it is clear that the court could have no subject matter jurisdiction over any refund suit brought by the corporate plaintiff. Schwab Brothers is a separate taxable entity. As such, it must file its own refund claim before, under Section 7422(a), it can bring a refund suit. Plaintiffs do not allege, however, that any such claim was ever filed, which alone should keep the corporation out of the lawsuit. The Government, by contrast, has affirmatively shown that no such claim was either received or rejected by the Internal Revenue Service. There is no way, therefore, in which Schwab Brothers would be a proper party to this action.

Regardless of the merits of plaintiffs' allegations, in the face both of their nonpayment of taxes and of their noncompliance with the requirements of the statutes, the District Court was without power to adjudicate this lawsuit. The case should therefore be dismissed for want of subject matter jurisdiction.

ARGUMENT

I

THE DISTRICT COURT LACKED SUBJECT MATTER
JURISDICTION OVER THIS ACTION

A. Introduction

It is a well-established principle that the United States is not subject to suit, except by its consent. Affiliated Ute Citizens v. United States, 406 U.S. 128, 141 (1972), rehearings denied, 407 U.S. 916 (1972), 408 U.S. 931 (1972). In granting its consent to be sued, the sovereign may attach such conditions as it deems proper, and in order to institute suit against the United States, there must be strict compliance with all of these conditions. United States v. Sherwood, 312 U.S. 584, 586 (1941); Osborn v. United States, 322 F. 2d 835, 838 (C.A. 5, 1963). It is also well settled that any waiver of sovereign immunity is to be strictly construed. United States v. Sherwood, supra, p. 590; United States v. Michel, 282 U.S. 656, 660 (1931).

The United States has consented, in carefully delineated circumstances, to refund suits for erroneously or illegally collected taxes. Sec. 7422 of the Internal Revenue Code of 1954, Appendix A, infra. Although plaintiffs now characterize their suit as being (Br. 2) "in actuality, an action for an

accounting," for several reasons the present suit must realistically be viewed as one for refund of taxes. First, of course, it was alleged to be an action for refund in both Paragraphs 2 and 9 of the complaint (Compl. 1, 2, Appendix B, infra), and plaintiffs are not now entitled to suddenly change their mind as to the nature of their lawsuit. Second, plaintiffs have failed not only in their complaint but in their brief to allege any jurisdictional base for this "action for an accounting," an action which may well run afoul of the Declaratory Judgment Act.^{5/}

In order for the District Court to have jurisdiction, "regardless of the form of an action to recover funds seized on an assessment, an absolute prerequisite to its maintenance is the filing of a claim for refund or for a proper credit pursuant to the statutes." Kelly v. Springett, 527 F. 2d 1090, 1093 (C.A. 9, 1975). The statutes alluded to in that case are four sections of the Internal Revenue Code of 1954, all of which are involved in a suit for refund. The first of these, Section

^{5/} The so called Declaratory Judgment Act, 28 U.S.C., Section 2201, Appendix A, infra, of course, specifically excepts from its coverage any controversies "with respect to Federal taxes." Cf. Flora v. United States, 362 U.S. 145, 164-165 (1960).

6511(a), Appendix A, infra, provides that any claim for refund must be filed within three years from the time the return was filed or within two years from the time the tax was paid. If no claim was filed within such period, no refund shall be allowed. Sec. 6511(b)(1), Appendix A, infra. Section 7422(a) then provides as follows:

No suit * * * shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected * * * until a claim for refund * * * has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof. (Emphasis supplied.)

Finally, Section 6532(a), Appendix A, infra, provides that a refund suit may not be commenced prior to six months from the filing of a claim with the Internal Revenue Service, unless a decision on the claim is made within that time, nor commenced more than two years after the claim has been disallowed. These various statutory requirements are synthesized in Treasury Regulations on Procedure and Administration (1954 Code), Section 301.6402-2(a), Appendix A, infra.

It is the Government's position that, regardless of the merits of plaintiffs' allegations, no refund claim was "duly filed" with the Internal Revenue Service within the meaning of

Section 7422(a). Furthermore, even if such a claim was submitted, it seems apparent that it was untimely and that relief, therefore, is barred by the applicable statutes of limitations. Under each of these theories, it is clear that the District Court lacked subject matter jurisdiction over plaintiffs' lawsuit and accordingly, that it properly dismissed the complaint. ^{6/} These

6/ As noted above, page 7, supra, while this case was pending in Florida, the Government moved to dismiss for want of subject matter jurisdiction, a motion authorized by Rule 12(b)(1) of the Federal Rules of Civil Procedure, Appendix A, infra. This motion was supported by an affidavit (R. 25) to the effect that the Internal Revenue Service had no record of receiving or rejecting any claim for refund made either by plaintiffs or on behalf of Schwab Brothers. Upon retransfer of the case to New York, Judge Burke stated that since matters outside the pleadings were presented for his consideration, he would (presumably under the authority of Rule 12(c), Appendix A, infra) treat the motion as one for summary judgment under Rule 56. Accordingly, the Government submitted a motion for summary judgment (see Appendix B, infra). On February 23, 1977, the court granted that motion, dismissing the complaint with prejudice on the ground that there was no dispute as to any material fact and that the Government was entitled to summary judgment as a matter of law. (R. 14.)

While the Government agrees that the complaint should be dismissed, it seems clear that the procedurally correct disposition would have been the one initially proposed by the Government, e.g., dismissal for want of subject matter jurisdiction. See Rule 12(h)(3), Appendix A, infra. It is the Government's contention, as set forth at pages 20 through 30, infra, that plaintiffs' failure to "duly file" a refund claim with the Internal Revenue Service deprived the District Court, under Section 7422(a), of jurisdiction over their later refund suit. Where such lack of subject matter jurisdiction is demonstrated, the case should be dismissed on that ground, Solomon v. Solomon, 516 F. 2d 1018, 1027 (C.A. 3, 1975); John Birch Society v. National Broadcasting Co., 377 F. 2d 194, 197 (C.A. 2, 1967)

arguments are set forth in detail in the next two sections of this brief. Before turning to them, however, we wish to point to yet a third reason why, very probably, the District Court lacked subject matter jurisdiction over this lawsuit.

That reason, simply put, is that it is highly doubtful that plaintiffs have ever actually paid the taxes for which they now seek a refund. Since, under Flora v. United States, 362 U.S. 145 (1960), the payment of taxes is a prerequisite to a refund action, it would seem that on this ground alone plaintiffs would be barred from maintaining this lawsuit. See also West Chester Feed & Supply Co. v. Erwin, 438 F. 2d 929, 930 (C.A. 6, 1971). The plaintiffs here have not alleged that taxes have been paid, and indeed, all indications are to the contrary. Thus, in their complaint they allege merely (p. 2, Appendix B, infra) that at all times material they filed "tentative" or "not final" returns "in which no claim was made with respect to

6/ (continued)

(lack of diversity jurisdiction); Thompson v. United States, 291 F. 2d 67, 68 (C.A. 10, 1961); Miller v. National Maritime Union, 275 F. Supp. 809, 810 (E.D. Pa., 1967), rather than being disposed of by a motion for summary judgment. This is because a summary judgment decision is an adjudication on the merits and a court which lacks jurisdiction has no power to decide the merits of a case. Miller v. National Maritime Union, supra, p. 810; see generally 6 Moore's Federal Practice (2d ed.), par. 56.03, p. 56-55; 5 Wright and Miller, Federal Practice and Procedure (1970 ed.), §1350, p. 542.

the tax[es] due, if any." Further, the clear implication of their second argument (Br. 7-8), that they have standing to sue as taxpayers, is that it was the corporation, Schwab Brothers, and not plaintiffs, who in fact paid the taxes here.^{7/} But under Moline Properties, Inc. v. Commissioner, 319 U.S. 436 (1943), discussed in more detail at page 34, infra, the corporation and the plaintiffs are clearly separate taxpayers. Schwab Brothers' payment of taxes, therefore, does not satisfy the requirements of Flora as to the plaintiffs.

Plaintiffs maintain, of course (Compl. 2, Appendix B, infra; Br. 3, 5, 6), that the reason they cannot make their claims more precise is that the Internal Revenue Service seized corporate books, records, and documents, and neither inventoried the assets taken nor made an accounting as to the attribution of monies received. While we do not concede the truth of these statements (which are bolstered by no copies, for instance, of correspondence relating to these matters between the plaintiffs and the Internal Revenue Service), it is difficult to understand how, even if true, they aid plaintiffs. Clearly, if true, the actions by the Internal Revenue Service would hamper plaintiffs when making

^{7/} Indeed, plaintiffs at Brief 8 specifically state that "the tax [was] paid from the corporate assets."

a refund claim on behalf of their corporation. But even if plaintiffs did not know the extent of the corporate liability, we fail to see the relevance of this to their own, individual liabilities, liabilities that were the subject of their alleged refund claim. Surely it is far-fetched to claim, as plaintiffs seem to do, that they are unaware of the taxes which they themselves have paid. Conceivably they are not certain as to the amounts they owe the Government, but they certainly must know what amounts they have actually paid over. No such amounts, however, have been alleged in their complaint.

In view of these circumstances and since plaintiffs have failed to establish basic jurisdictional facts, they are barred by Flora from maintaining this suit. While the remainder of this brief proceeds on the assumption that the taxes have in fact been paid, we make this assumption only for the purpose of showing the other reasons why there is no subject matter jurisdiction over this action. We do not in any way intend, however, to waive our Flora objection. That being so, even if this Court were to find that the June 26, 1972, letter written by plaintiffs' counsel both stated their claim with the requisite specificity and was timely filed, there would still be no subject matter jurisdiction over this lawsuit.

B. Plaintiffs' letter of June 26, 1972,
does not constitute an informal
claim for refund

One of the purposes of requiring an administrative claim for refund to be filed as a prerequisite to a refund suit is to insure an orderly administration of the revenue. United States v. Felt & Tarrant Co., 283 U.S. 269, 272 (1931); Barenfeld v. United States, 442 F. 2d 371, 373 (Ct. Cl., 1971). In addition, the Commissioner is provided with an opportunity to correct any errors, and if disagreement remains, to limit the scope of any ensuing litigation to those issues which have been examined and which he is willing to defend. Thompson v. United States, 332 F. 2d 657, 660 (C.A. 5, 1964); Carmack v. Scofield, 201 F. 2d 360, 362 (C.A. 5, 1953). Treasury Regulations on Procedure and Administration (1954 Code), Section 301.6402-3(a)(1), Appendix A, infra, provide that in the case of income taxes, refund claims may be made not only on Form 843 but also on any individual or corporation income tax return, or on any amended income tax return. Regulations Section 301.6402-2(b)(1) states that the claim "must set forth in detail each ground upon which a * * * refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof." The statement of the grounds and

facts must be made under penalties of perjury. Finally, Regulations Section 301.6402-2(d) provides that in the case of income and federal unemployment taxes, a separate claim shall be made for each type of tax for each taxable year or period.

It is glaringly obvious, of course, that plaintiffs' letter of June 26, 1972 (R. 5-6), does not meet any of the requirements set forth above. Further, although the Commissioner may waive formal requirements as to the contents of a refund claim, the showing of waiver must be unmistakable, for he may insist upon full compliance with Treasury Regulations. Angelus Milling Co. v. Commissioner, 325 U.S. 293, 296-298 (1945). In view of the letter of July 12, 1972, from the District Director to plaintiffs' counsel (R. 7), notifying taxpayer that his letter of June 26 did not constitute even a proper protest (much less a valid claim), a waiver argument here can not be successful, and in fact plaintiffs do not make one. What they do argue (Br. 4-6) is that their June letter constituted an informal claim for refund. It is clear, however, that this contention is without merit.

Informal claims for refund, which have been recognized by the Supreme Court, United States v. Kales, 314 U.S. 186, 194 (1941), "have normally been recognized in conjunction with later-filed 'perfecting' claims, the informal claim being allowed to toll the statute of limitations." Clement v. United States,

472 F. 2d 776, 779 (C.A. 1, 1973), cert. denied, 414 U.S. 864 (1973). In American Radiator & Standard San. Corp. v. United States, 318 F. 2d 915, 920 (Ct. Cl., 1963), the three components of a valid informal claim are outlined. First, the claim must be in writing. Second, the claim must adequately apprise the Internal Revenue Service that a refund is sought; there must be, in other words, "some form of request for a refund." Third, there must be made available sufficient information as to the tax and the year to enable the Internal Revenue Service, if it wishes, to commence an examination of the merits of the claim.

It is obvious from the case law that the information plaintiffs provided was not, by itself, specific enough to constitute notice of a refund claim. See United States v. Felt & Tarrant Co., supra, 283 U.S., pp. 271, fn. 1, 272; Clement v. United States, supra, 472 F. 2d, pp. 777, 780; Stoller v. United States, 444 F. 2d 1391, 1393 (C.A. 5, 1971); Tobin v. Tomlinson, 310 F. 2d 648, 650 (C.A. 5, 1962), cert. denied, 375 U.S. 929 (1963); see also Austin v. United States, 461 F. 2d 733, 736, 738 (C.A. 10, 1972). Plaintiffs maintain, however (Br. 6), that agents of the Internal Revenue Service had sufficient information concerning the nature

of their claim to satisfy the third element of a valid informal refund claim. Given plaintiffs' total failure to request a refund, however, the extent of the Internal Revenue Service's knowledge in this regard is irrelevant.

It is clear, of course, that the second element of the test, that of "some form of request for a refund," was completely unsatisfied here. The most careful perusal of the letter fails to turn up even one word concerning the possible refund of taxes; there is not indeed even a hint that such action is desired. Nor, contrary to plaintiffs' assertion (Br. 5), does the letter "express the fear that plaintiffs may have overpaid their tax liability"; that statement is purely and simply inaccurate.

Plaintiffs seek to avoid the consequences of this failure to request a refund by arguing (Br. 5) that "an express claim could not be made." Their inability to make an express claim, they maintain, was caused by the Internal Revenue Service's seizure of all corporate assets, books, and records, and by its failure to provide either an inventory of the assets seized or an accounting of the attribution of monies received. But even ^{8/} assuming arguendo that these allegations are true, plaintiffs

^{8/} The Government would note that it is not entirely clear why a levy on corporate assets in 1965 makes it impossible for plaintiffs to compute their individual income tax liability for such later years as 1970 to 1972.

still should not prevail. Surely, even if the allegations be true, they should be required to make some sort of request for refund, even if it was a contingent or provisional one. If plaintiffs' letter had contained a sentence to the effect that "We cannot ascertain at this point whether we are entitled to a refund, but if we are, we want to have it," then their case, while full of uncertainty, might be stronger. Cf. Neal v. United States, 402 F. Supp. 678 (N.J., 1975). Given their total silence as to even the possibility of a refund, however, plaintiffs cannot maintain this action now.^{9/}

The significance of plaintiffs' failure to make any sort of a request for refund is that, absent such a request, the fact that the Commissioner may have access to information that might give rise to a claim for refund does not constitute notice to him that a claim is asserted based on that information. As the Supreme Court observed in Angelus Milling Co. v. Commissioner, supra, 325 U.S., p. 299, "it is not enough that somewhere under the Commissioner's roof is the information which might enable him to pass on a claim for refund." That statement was elaborated

^{9/} As noted above, the alleged claim does not even state that any taxes had been paid, an allegation which is clearly necessary to maintain their contention that taxes were illegally collected.

on in Union Pacific Railroad Co. v. United States, 389 F. 2d 437 (Ct. Cl., 1968), where the court stated (pp. 444-445):

Mere availability of the facts underlying a claim, however, is not enough to find that an intention to claim a refund has been communicated. * * *

* * *

Availability of information is not equivalent to notice that a claim is asserted based on that information.

This principle has also been enunciated in other cases. Thus, where written documents provided the Internal Revenue Service neither expressly nor impliedly informed the Commissioner that plaintiffs sought a refund, the documents did not constitute claims for refund, even though a revenue agent was well aware when the documents were filed that plaintiffs objected to having deficiencies assessed against them. Barenfeld v. United States, supra, 442 F. 2d, p. 374. Similarly, where the written memorandum of the claim was insufficient to provide notice that plaintiff sought a refund, it was unnecessary to take further evidence to determine precisely what agents of the Internal Revenue Service knew concerning plaintiff's claim. Kuehn v. United States, 480 F. 2d 1319, 1322 (Ct. Cl., 1973).

Therefore, it is clear in the instant case that even if agents of the Internal Revenue Service knew of facts that might entitle the Schwabs to a refund, such knowledge does not mean that plaintiffs made any claim. As one court succinctly said: "Errors or misunderstandings may give rise to a claim for refund. They do not state one." Clement v. United States, supra, 472 F. 2d, p. 780.

Plaintiffs' letter of June 26, 1972, was at best a protest of apparently unassessed income taxes, and unquestionably was not a refund claim for taxes erroneously paid. Accordingly, the District Court was without subject matter jurisdiction over plaintiffs' refund suit for all of the years at issue here.

C. The statute of limitations bars suit as to most of the years in issue here

An alternative ground for denying plaintiffs relief here is that most of the years in issue are barred by the statute of limitations. As noted above, Section 6511(a) requires that a claim for refund must be filed within three years from when the return was filed or within two years from the time the tax is paid, whichever is later, and Section 7422(a) bars any refund suit unless such a claim has previously been "duly filed" with the Internal Revenue Service. But while an untimely refund

claim is not "duly filed," Crismon v. United States, 550 F. 2d 1205, 1206 (C.A. 9, 1977), appeal docketed, No. 77-145, 46 U.S. Law Week 3039 (Sup. Ct., July 27, 1977); Mondschein v. United States, 338 F. Supp. 786, 788 (E.D. N.Y., 1971), aff'd per curiam, 469 F. 2d 1394 (C.A. 2, 1973); Schneider v. United States, 300 F. Supp. 136, 137 (S.D. N.Y., 1969), the filing of a timely claim for refund is a prerequisite to the bringing of a tax refund suit. Moses v. United States, 61 F. 2d 791, 794 (C.A. 2, 1932), cert. denied, 289 U.S. 743 (1933); Sappington v. United States, 408 F. 2d 817, 819 (C.A. 4, 1969), cert. denied, 396 U.S. 876 (1969); Ancel v. United States, 398 F. 2d 456, 457 (C.A. 7, 1968). Further, the provision in Section 7422(a) barring a refund suit unless an administrative claim has previously been filed has uniformly been interpreted as establishing a jurisdictional requirement that cannot be waived. Bruno v. United States, 547 F. 2d 71, 74 (C.A. 8, 1976); Essex v. Vinal, 499 F. 2d 226, 231 (C.A. 8, 1974), cert. denied, 419 U.S. 1107 (1975); Bohn v. United States, 467 F. 2d 1278, 1280 (C.A. 8, 1972); Canton v. United States, 388 F. 2d 985, 986 (C.A. 8, 1968); United States v. Rochelle, 363 F. 2d 225, 231 (C.A. 5, 1966). Finally, the necessity for filing the claim is not dispensed with because the claim may be rejected. United States v. Felt & Tarrant Co., supra, 283 U.S., p. 273; Bohn v. United States, supra, p. 1279.

Assuming arguendo for the moment that plaintiffs' letter of June 26, 1972 (R. 5-6) constitutes a valid claim for refund for the years 1964 through 1972, and assuming further that returns were filed for those years, it is clear from the authority cited above that the claim was not timely filed for most of the years in issue here. Under Section 6513(a), Appendix A, infra, plaintiffs' return for each taxable year would be deemed to have been filed on April 15 of the succeeding year. Since Section 6511(a) requires a claim to be filed within three years of the time the return was filed, it seems clear that the years 1964 through 1969^{10/} would be time barred and hence the statute would bar relief as to these years.

It must be admitted, however, that it is not possible to say definitively that all years through 1969 are barred by limitations. The problem here is that the alternative period of limitations established by Section 6511(a) is two years from the date the taxes were actually paid, and it is impossible to ascertain from the record whether this exception to the general rule is applicable. As pointed out above, while plaintiffs' complaint (p. 2,

^{10/} Although at first glance it might appear that 1969 is not outside the limitations period, a closer look reveals that it falls on the wrong side of the line. To be timely, any claim for 1969 would have to have been filed by April 15, 1972. The letter, of course, is dated several weeks later and, thus, 1970 is the first year for which a timely claim may have been filed.

par. 6, Appendix B, infra), is quite imprecise in this regard, the whole tenor of their second argument (Br. 7-8) indicates that, in fact, the only taxes paid were collected from the corporation, Schwab Brothers, and that plaintiffs, as individuals, have not paid taxes for the years in issue.^{11/} But of course if they have not paid such taxes, they are precluded from bringing a refund suit, regardless of any considerations of limitations. Flora v. United States, supra.

In any event, even if plaintiffs had so recently paid their taxes for the years 1964 through 1969 that they come within the^{12/} period of limitations, and even with respect to the years 1970

^{11/} Plaintiffs' argument (Br. 7-8) that because Schwab Brothers was a closely held corporation the tax paid by the corporation was in fact paid by the plaintiffs, a contention singularly without merit, is discussed in more detail at pages 34-35, infra.

^{12/} A final point of interest with respect to limitations is that plaintiffs do not fall within the six-year period found in 28 U.S.C., Section 2401(a), Appendix A, infra. That section is the general limitations statute applicable to suits against the Government, Ancel v. United States, supra, 398 F. 2d, p. 458, but yields in tax refund suits to the more specific terms of Section 6511(a) of the Internal Revenue Code. Bruno v. United States, supra, 547 F. 2d, p. 74. But even if plaintiffs' contention (Br. 2) that this lawsuit is really an action for an accounting were accepted (ignoring, for the moment, all the questions of jurisdiction that this entails), it is clear that the action would be barred by limitations. Whatever cause of action plaintiffs might have surely arose in 1965, when the assessments and levies with respect to Schwab Brothers were made. See p. 3, supra. The general limitations period, of course, would have run sometime in 1971, yet the instant complaint was

to 1972, plaintiffs have still not met all of the statutory requirements for bringing a refund suit. As shown above, the letter of June 26, 1972, cannot be regarded as a claim for refund and the requirements of Sections 6511(a) and 7422(a) have not been complied with; therefore, a refund suit may not now be maintained.

II

THE DISTRICT COURT DID NOT ERR IN DENYING
PLAINTIFFS' MOTION TO ADD SCHWAB BROTHERS
TRUCKING COMPANY, INC. AS A PARTY PLAINTIFF

At an early stage in this lawsuit, on May 3, 1973, plaintiffs moved for an order allowing them to amend their complaint by adding Schwab Brothers as a party plaintiff. (R. 16.) In support of that motion counsel for the Schwabs submitted an affidavit, stating it to be his conclusion that the issues to be determined in this matter "required that the corporation be added as a party plaintiff primarily because any verdict in favor of the plaintiffs could not be fully effectuated if the corporate plaintiff were not a party to the lawsuit." (R. 9.) The District Court denied this motion (R. 21), observing (R. 20) as follows:

12/ (continued)

not filed until February 21, 1973. (R. 15.) Regardless of what wrongs plaintiffs may have suffered (a point we certainly do not concede), they have clearly waited too long to be now entitled to redress.

The corporation is a separate taxable entity. A complete determination of the issue whether the original plaintiffs are entitled to a refund of taxes, as claimed in their first cause of action, is no way dependent on whether the corporation has a valid claim or claims against the defendant. There is no basis for the assertion that any verdict in favor of the plaintiffs could not be fully effectuated if the corporation was not a party to the suit. The motion is a futile attempt to correct the defect of improper venue.

While the Government is in full agreement with this statement, plaintiffs urge (Br. 1, 8, 9) that denial of their motion constituted error. It is clear, however, that this argument is without merit.

Plaintiffs base their entire argument in this regard on the ground (Br. 8-9) that under New York law Schwab Brothers has capacity to sue and should therefore be joined as a party plaintiff. But even if the corporation did have the requisite capacity, ^{13/} a proposition which is in considerable doubt, it does not follow

^{13/} The question involved as to Schwab Brothers' capacity to sue arises because of that corporation's dissolution, pursuant to New York law (Tax Law, McKinney's Consol. Laws of N.Y. Ann., §203-a) in 1971. See Defendant's Memorandum in Opposition to Plaintiffs' Motion to Amend the Complaint, pp. 3-4, and attached certified document of the Secretary of State of the State of New York. According to New York law, however, mere dissolution of a corporation does not, of itself, prevent a corporation from suing in its own name. See General Corporation Law, McKinney's Consol. Laws of N.Y. Ann., §29. But while dissolution itself does not prevent such a suit, in order for the dissolved corporation to maintain an action in its own name, such action must be authorized by the board of directors of the corporation. Dieselcraft Corp. v. Joca Realty Corp.; 161 N.Y.S. 2d 761 (1957).

that it is a proper party plaintiff. Capacity to sue is a necessary condition, but is not here a sufficient one. Indeed, it is apparent that, on the present record, allowing the corporation to be joined as a party plaintiff would have been error.

First, of course, since the District Court did not have subject matter jurisdiction over plaintiffs' case, it actually was without power to enter any order concerning the suit except

13/ (continued)

Plaintiffs, however, maintain (Br. 9) that in the absence of action prohibiting or failing to authorize Mr. Schwab's bringing of this lawsuit, it should be presumed that he had the authority to do so. They cite in support of this proposition two cases (Br. 8), Rothman & Schneider v. Beckerman, 2 N.Y. 2d 493, 161 N.Y.S. 2d 118 (1957), and West View Hills v. Lizau Realty Corp., 6 N.Y. 2d 344, 189 N.Y.S. 2d 863 (1959). These cases, however, are distinguishable on a variety of grounds, the most noticeable being that in neither one had a dissolution occurred. Further, in West View Hills, where the court found justification for the president's commencing suit prior to the board's affirmative authorization, the members of the board had their own interests to protect, interests which were allegedly contrary to those of the corporation. The facts in Rothman & Schneider were even more compelling: the board of directors was evenly split, and the cause of action was directed against the son-in-law of the president and his wife, two of the four directors. The action was brought by the secretary-treasurer, who with his wife was also a director of the corporation and who alone was actively running the business. Under these circumstances the court felt that the secretary-treasurer should be able to institute a suit, on behalf of and in the interests of the corporation.

In any event, while the Government does not believe that West Hills Realty and Rothman & Schneider excuse Mr. Schwab's failure to comply with the requirements of New York law, we do feel, as noted above, that regardless of capacity to sue Schwab Brothers is not a proper party plaintiff to this litigation.

one of dismissal, see, e.g., John Birch Society v. National Broadcasting Co., 377 F. 2d 194, 197 (C.A. 2, 1967); Fleischmann Distilling Corp. v. Distillers Co. Ltd., 395 F. Supp. 221, 226, fn. 6 (S.D. N.Y., 1975); Miller v. National Maritime Union, 275 F. Supp. 809, 810 (E.D. Pa., 1967). Therefore, had the District Court actually granted plaintiffs' motion, it would seem that that order would now have to be vacated on appeal. On the present record, of course, it can hardly be contended that it was error to deny plaintiffs leave to add a party plaintiff when plaintiffs themselves are not properly in court.

Moreover, even if this Court were to hold that plaintiffs' letter of June 26, 1972, constituted a valid informal claim for refund of their taxes, and thus that the District Court had jurisdiction over their suit, it is still entirely clear that Schwab Brothers could not be a proper party plaintiff in this, or any other, refund suit. The reason for this is that Schwab Brothers, a separate taxable entity, has not "duly filed" a refund claim. Therefore, it cannot now maintain a refund suit in the District Court. See Secs. 6511(a), 7422(a)

Plaintiffs do not allege that the corporation filed a ^{14/} refund claim on its own behalf, and indeed the record affirmatively

^{14/} In fact, plaintiffs allege merely that Schwab Brothers "filed tax returns in respect of which claim is made" (R. 11) (emphasis added), an allegation which on its face is insufficient to confer jurisdiction upon a District Court.

shows that no such claim was ever made or rejected. (R. 25.) Instead, they seek (Br. 7-8) to avoid this problem by arguing that, since Schwab Brothers was a closely held corporation, it and plaintiffs should be viewed as one. This contention, however, is entirely without merit. In Moline Properties, Inc. v. Commissioner, supra, 319 U.S., p. 439, the Supreme Court held that if the purpose behind creating a corporate entity was either "the equivalent of business activity or is followed by the carrying on of business by the corporation, the corporation remains a separate taxable entity." Although the Court noted that "in matters relating to the revenue, the corporate form may be disregarded where it is a sham or unreal," plaintiffs here make no claim that Schwab Brothers did not carry on business activity. Indeed, their contention is just the opposite: they maintain (Br. 2) that their business "in full blossom had hundreds of employees, myriad equipment and millions in annual billings." Given the far lower level of activity which this Court has held sufficient to subject a corporation to separate taxation, see, e.g., Commissioner v. State-Adams Corp., 283 F. 2d 395 (C.A. 2, 1960), cert. denied, 365 U.S. 844 (1961); Paymer v. Commissioner, 150 F. 2d 334 (C.A. 2, 1945), it is

obvious that plaintiffs and Schwab Brothers must be considered as separate taxpayers.

That being so, Schwab Brothers must, as a prerequisite to filing a refund suit, file its own refund claim; it may not rely on the one submitted by plaintiffs (Rosengarten v. United States, 181 F. Supp. 275 (Ct. Cl., 1960), cert. denied, 364 U.S. 822 (1960)) even if the identical legal question were involved. Barenfeld v. United States, supra, 442 F. 2d, p. 371. Since the record shows (R. 25) that no such refund claim was filed, there would be no subject matter jurisdiction over the corporation's suit for refund, and hence no justification for joining the corporation as a party plaintiff in the present suit.

CONCLUSION

For the reasons stated above, the judgment of the District Court should be affirmed or, in the alternative, vacated and the case remanded with instructions to dismiss plaintiffs' action for want of subject matter jurisdiction.

Respectfully submitted,

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AUGUST, 1977.

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on opposing counsel by mailing four copies thereof on this 19th day of August, 1977, in an envelope, with postage prepaid, properly addressed to them as follows:

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APPENDIX A

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 6511. LIMITATIONS ON CREDIT OR REFUND.

(a) [as amended by Sec. 82(a), Technical Amendments Act of 1958, P.L. 85-866, 72 Stat. 1606] Period of Limitation on Filing Claim.--Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid.

(b) Limitation on Allowance of Credits and Refunds.--

(1) Filing of claim within prescribed period.--No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by the taxpayer within such period.

*

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SEC. 6513. TIME RETURN DEEMED FILED AND TAX CONSIDERED PAID.

(a) Early Return or Advance Payment of Tax.--For purposes of section 6511, any return filed before the last day prescribed for the filing thereof shall be considered as filed on such last day. For purposes of section 6511(b)(2) and (c) and section 6512, payment of any portion of the tax made before the last day prescribed for the payment of the tax shall be considered made on such last day. For purposes of this subsection, the last day prescribed for filing the return or paying the tax shall be determined without regard to any extension of time granted the taxpayer and without regard to any election to pay the tax in installments.

SEC. 6532. PERIODS OF LIMITATION ON SUITS.

(a) Suits by Taxpayers for Refund.--

(1) [as amended by Sec. 89(b), Technical Amendments Act of 1958, supra] General rule.--No suit or proceeding under section 7422(a) for the recovery of any internal revenue tax, penalty, or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary or his delegate renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary or his delegate to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates.

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SEC. 7422. CIVIL ACTIONS FOR REFUND.

(a) No Suit Prior to Filing Claim for Refund.--No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

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Treasury Regulations on Procedure and Administration (1954 Code)
(26 C.F.R.):

§ 301.6402-2 Claims for credit or refund.

(a) Requirement that claim be filed. (1) Credits or refunds of overpayments may not be allowed or made after the expiration of the statutory period of limitation properly applicable unless, before the expiration of such period, a claim therefor has been filed by the taxpayer. Furthermore, under section 7422, a civil action for refund may not be instituted unless a claim has been filed within the properly applicable period of limitation.

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(b) Grounds set forth in claim. (1) No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed before the expiration of such period. The claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof. The statement of the grounds and facts must be verified by a written declaration that it is made under the penalties of perjury. A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund or credit.

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(d) Separate claims for separate taxable periods. In the case of income, gift, and Federal unemployment taxes, a separate claim shall be made for each type of tax for each taxable year or period.

*

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§ 301.6402-3 Special rules applicable to income tax.

(a) (1) In the case of income tax, claims for refund may not only be made on Form 843 but may also be made on any individual, fiduciary, or corporation income tax return, or on any amended income tax return.

* * *

28 U.S.C.:

§ 1346. United States as defendant.

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

* * *

§ 1402. United States as defendant.

(a) Any civil action against the United States under subsection (a) of section 1346 of this title may be prosecuted only:

(1) Except as provided in paragraph (2), in the judicial district where the plaintiff resides;

* * *

§ 2201 [as amended by Sec. 111, Act of May 24, 1949,
c. 139, 63 Stat. 89]. Creation of remedy.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

§ 2401. Time for commencing action against United States.

(a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

* * *

Federal Rules of Civil Procedure:

Rule 12.

DEFENSES AND OBJECTIONS--WHEN AND HOW PRE-
SENTED--BY PLEADING OR MOTION--MOTION
FOR JUDGMENT ON THE PLEADINGS

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, * * *

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

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(h) Waiver or Preservation of Certain Defenses.

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(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

PHILIP B. SCHWAB AND
MARY LOUISE SCHWAB
6275 Ocean Boulevard
Ocean Ridge, Florida

[FILED FEBRUARY 21, 1973]

Plaintiffs

COMPLAINT

-vs-

UNITED STATES OF AMERICA

Defendant

The plaintiffs, for their Complaint, allege as follows:

FOR A FIRST, SEPARATE AND DISTINCT CAUSE OF ACTION,
THE PLAINTIFFS ALLEGE:

1. That the plaintiffs and each of them are citizens of the United States of America and residents of the State of Florida residing at 6275 Ocean Boulevard, Ocean Ridge, Florida.
2. That this cause of action is for a determination pursuant to Title 26 of the United States Code of credits, overpayments and refunds due the plaintiffs and each of them from the defendant, UNITED STATES OF AMERICA, regarding the income tax due and owing upon the plaintiffs' income for the years 1964 through 1972 inclusive.
3. Upon information and belief, that in or about the year 1964, the plaintiff, PHILIP B. SCHWAB, was a corporate officer and shareholder in a business commonly known as Schwab Brothers Trucking Company, Inc., a corporation duly organized and existing under and pursuant to the laws of the State of New York.
4. Upon information and belief, that during the said year and thereafter, the Internal Revenue Service of the United States of America, acting through its Buffalo District Office, caused or contributed to, the financial failure of

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said business by the manner and means through which the defendant's Internal Revenue Service went about the collection of certain taxes asserted to be due and owing by the corporation.

5. Upon information and belief, that commencing in said year and thereafter, the defendant through its Internal Revenue Service seized all of the assets of the said corporation and collected proceeds of various indebtednesses due and owing the corporation and ever since that time held said assets and said monies without ever accounting to the plaintiffs or either of them with respect to the property.

6. Upon information and belief, that at all times material, the plaintiffs and each of them have filed Federal Income Tax Returns labeled variously "tentative" or "not final" in which no claim was made with respect to the tax due, if any, or the refund due, if any, because of their lack of knowledge as to the exact financial position respecting said assets as between the parties, and because the seizure of assets heretofore alleged was accompanied by a seizure of all of the corporate books, records and documents.

7. That said information is solely and exclusively with the possession of the defendant and the plaintiffs have not been or are not now in a position to fully and fairly state the amount of their claim for either credits, adjustments or overpayments, and will not be in a position to do so until the determination of the cause of action herein alleged.

8. That a claim for credits or refunds was filed on June 26, 1972, setting forth the plaintiffs' position with respect to all tax matters then and there existing between the parties and that such claim was disallowed on July 12, 1972.

9. That more than six months have elapsed and less than two years from the time of the filing of said claim and its disallowance and that the cause of action herein is based upon the claim for refund or credit made therein.

FOR A SECOND CAUSE OF ACTION, THE PLAINTIFF, PHILIP B. SCHWAB, ALLEGES AS FOLLOWS:

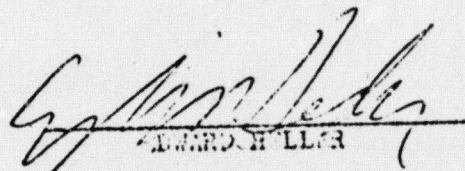
10. Repeats and realleges allegations contained in paragraphs numbered "1" through and including "5" of this Complaint as though hereinagain fully set forth.

11. That the manner and means by which the defendant through its Internal Revenue Service went about the seizure of the plaintiff's assets displayed an intentional or reckless disregard of the plaintiff's constitutional rights, and further, was in violation of the defendant's own Internal Revenue Service's rules and regulations respecting the manner in which asserted tax deficiencies were to be collected.

12. That as a result thereof, the plaintiff, PHILIP B. SCHWAB'S business was irreparably destroyed and his livelihood taken from him, all to his damage in the sum of FIVE MILLION DOLLARS (\$5,000,000.00).

WHEREFORE, the plaintiffs demand judgment as follows: in their first cause of action, the plaintiffs PHILIP B. SCHWAB and MARY LOUISE SCHWAB demand judgment determining the amount of overpayment, credit or refund due them for the taxable years 1964 through 1972. On the second cause of action, the plaintiff, PHILIP B. SCHWAB, demands judgment for FIVE MILLION DOLLARS (\$5,000,000.00) with interest and together with the costs and disbursements of this action.

DATED: Buffalo, New York
February 21, 1973


EDWARD HELLER

HELLER AND RANN
Attorneys for Plaintiffs
Office & P.O. Address
1330 Statler Hilton Hotel
Buffalo, New York 14202

Plaintiffs demand a trial by jury.

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

PHILIP B. SCHWAB and
MARY LOUISE SCHWAB,

Plaintiffs

v.

UNITED STATES OF AMERICA,

Defendant

CIVIL NO. 74-752-WPB-CF

MOTION TO DISMISS

The defendant, United States of America, moves this Court, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, to dismiss this action because the Court lacks jurisdiction over the subject matter of this lawsuit in that plaintiffs have failed to pay the taxes due or file a claim for refund as required by Section 7422 of the Internal Revenue Code of 1954. Thus, this Court lacks jurisdiction of the subject matter of this lawsuit. In support of this motion there is attached hereto, the Defendant's Memorandum in Support of Its Motion to Dismiss and Affidavit.

ROBERT W. RUST
United States Attorney

By: _____
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NEW YORK

PHILIP B. SCHWAB and
MARY LOUISE SCHWAB,

Plaintiffs

v.

UNITED STATES OF AMERICA,

Defendants

[FILED JUNE 2, 1975]

CIVIL ACTION NO. 1973-84

MOTION FOR SUMMARY JUDGMENT

The defendant, United States of America, by its attorney, Richard J. Arcara, United States Attorney for the Western District of New York, pursuant to Rule 56 of the Federal Rules of Civil Procedure respectfully moves that summary judgment be entered in its favor dismissing the complaint with prejudice and such costs to defendant as are allowed by law, on the grounds that there is no dispute of any material fact and the defendant is entitled to judgment as a matter of law as more fully set forth in the defendant's supporting brief.

RICHARD J. ARCARA
UNITED STATES ATTORNEY

By:

C. DONALD O'CONNOR
Assistant U. S. Attorney